Non-Traditional Resolutions to Mass Tort Disputes Take a Hit as AIDS-Infected Hemophiliacs Bear the Cost of Judge Posner's "Economic Justice"

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I. INTRODUCTION

Mass tort litigation has increased dramatically in the last twenty years.[1] This increase has placed significant burdens upon the justice system and has led courts to seek more efficient means of adjudicating mass torts than the traditional case-by-case method.[2] In order to avoid the repetition of evidence that can occur if various tort claims are tried individually, aggregative procedures and the class action device of Rule 23 of the Federal Rules of Civil Procedure have recently been deemed appropriate for use in mass tort cases.[3] Although such aggregative procedures differ from the "classical" ADR mechanisms of arbitration and mediation, they are nonetheless considered ADR procedures.[4]

According to Rule 23(c)(4)(A), when appropriate, an action may be brought or maintained as a class action with respect to certain particular

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[1] *See* MARK A. PETERSON & MOLLY SELVIN, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES 6 (1988).

[2] *See* 3 HERBERT B. NEWBERG ET AL., NEWBERG ON CLASS ACTIONS § 17.01 (2d ed. 1985); ALEXANDER B. AIKMAN, MANAGING MASS TORT CASES: A RESOURCE BOOK FOR STATE TRIAL COURT JUDGES 13 (1995).

[3] *See* CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1783 (1990). According to the advisory note to Rule 23, "mass accidents" are not appropriate for class actions because of the likelihood that significant legal and factual questions would affect individuals in different ways. Thus, some courts have denied certification of mass tort cases under Rule 23. However, most courts today ignore the Advisory Committee's statement and allow mass tort cases to be brought under Rule 23 (if the requirements of the Rule are met, of course). *See id.*

[4] *See* Deborah Hensler, *The Use of ADR in Mass Personal Injury Litigation*, 8 FJC DIRECTIONS 10 (1995). Dr. Hensler stated:

> [D]espite the many possible definitions of ADR and the very imprecise way that we have tended to use the term, I think there is a core defining principle that at least those in the ADR movement adhere to, and that is that ADR processes are those that permit the parties . . . to gain greater control over the resolution of their disputes . . . . ADR seems attractive as an approach to resolving mass torts because it promotes creative resolutions that may recognize the complexities of the litigation and balance the interests of all those involved in ways that simply are not possible in conventional, individualized litigation.

Id.

issues.[5] The seemingly straightforward language of Rule 23(c)(4)(A) has sparked a controversy between proponents of innovative procedures for resolving mass tort litigation and traditionalists who seek to "stay the course" by refusing to recognize innovative dispute resolution methods in the mass tort arena.[6] This Note addresses that controversy as illustrated by the *In re* Rhone-Poulenc Rorer, Inc. line of cases.[7] The innovative procedure applied by Judge John G. Grady in *Wadleigh v. Rhone-Poulenc Rorer, Inc.* (hereinafter *Wadleigh*),[8] a case based on a class action suit involving hemophiliacs who contracted Human Immunodeficiency Virus (HIV) as a result of alleged negligence on the part of health care providers, will be explained. Next, the logic behind Judge Posner's opinion in *In re* Rhone-Poulenc Rorer, Inc., refusing to implement Judge Grady's procedure and decertifying the class, will be analyzed. Finally, other examples of non-traditional means of resolving mass tort litigation problems that have been allowed by courts will be discussed.

In *Wadleigh*, Judge Grady used Rule 23(c)(4)(A) to certify the class with respect to the negligence issue, yet not the proximate cause issue.[9] If the defendants were found to have been negligent in the original suit, each individual plaintiff would then have had the burden of proving proximate cause in subsequent individual suits.[10] This plan could have saved courts time, and parties money, by precluding redundant litigation of the negligence issue at every trial (if in fact, the defendants were found negligent in the first place). Moreover, subsequent litigation of both the proximate cause issue and the negligence issue would have been entirely precluded if the defendants were not found negligent in the original trial.

The position adopted by this Note is that Judge Grady's plan should have been given an opportunity to succeed before being rejected by the Seventh Circuit. Innovative procedures for resolving mass tort disputes have

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[5] *See* FED. R. CIV. P. 23(c)(4)(A).

[6] Use of Rule 23 and other aggregative procedures by judges to consolidate mass tort litigations has been said to "represent a central goal [of the justice system] . . . the resolution of disputes." PETERSON & SELVIN, *supra* note 1, at 20. *See also* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1822 (1995) (noting that, in the arena of mass tort litigation, unique problems and policies have led "to more nontraditional aggregative solutions to mass tort issues").

[7] Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410 (N.D. Ill. 1994), *rev'd sub nom. In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S.Ct. 184 (1995) [hereinafter *Rhone*].

[8] 157 F.R.D. 410 (N.D. Ill. 1994).

[9] *See id.* at 423.

[10] *See id.*

been allowed by the Third, Fifth and Ninth Circuit Courts of Appeals.[11] Although all the appellate courts expressed misgivings regarding the likelihood of success for the original procedures, only the Seventh Circuit refused to give the trial judge's plan a chance to succeed.

II. INNOVATIVE PROCEDURE OF *WADLEIGH V. RHONE-POULENC RORER, INC.*

The case that prompted Judge Grady to develop an original mass tort resolution procedure, *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, involved hemophiliacs who had allegedly contracted HIV as a result of tainted blood protein concentrates provided by health care providers.[12] The plaintiffs alleged that the defendants who manufactured the blood factors (these defendants are known as fractionators) were negligent in selecting donors and failing to use available technology to sterilize their products.[13] The other defendant, the National Hemophilia Foundation (hereinafter Foundation), allegedly gave the plaintiffs unfounded assurances of the safety of the fractionators' products.[14] The plaintiffs' complaint charged the fractionators with negligence, strict products liability, breach of implied warranty and conspiracy; the plaintiffs' complaint charged the foundation with negligence and breach of fiduciary duty.[15]

In order to recover tort damages from any defendant, a plaintiff must establish both negligence and proximate cause.[16] The separation of these

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[11] *See In re* School Asbestos Litigation, 789 F.2d 996 (3d Cir. 1986); Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986); Arthur Young & Co. v. United States Dist. Court, 549 F.2d 686 (9th Cir. 1977).

[12] *See Wadleigh,* 157 F.R.D. at 413–414. Hemophilia is a hereditary bleeding disorder caused by an insufficiency of certain proteins in the blood which are necessary for coagulation to occur. These proteins are called "factors," and can be removed from the blood of donors, concentrated and infused into hemophiliacs to aid in clotting. Four defendants in this case are manufacturers who extract these factors (specifically, Factor VIII and Factor IX) from donated blood and distribute the finished product (called antihemophilic factor concentrate, or AHF for short) to hemophiliacs. The other defendant is the National Hemophilia Foundation, a non-profit association.

[13] *See id.* at 414.

[14] *See id.*

[15] *See id.*

[16] *See generally* RESTATEMENT (SECOND) OF TORTS § 431 (1977). In *Wadleigh*, the court stated, "[b]efore any member of the class would be entitled to damages, there must be proof of a causal relationship between the member's HIV infection and the negligence of some defendant. Specifically, each class member must prove proximate cause." *Wadleigh*, 157 F.R.D. at 421.

two concepts is the pivotal aspect of Judge Grady's plan in *Wadleigh*. According to Rule 23(b)(3), questions of law or fact common to all class members must predominate over any question affecting only individual members in order for a class action to be certified.[17] Proximate cause was deemed an individual issue unsuitable for class treatment because circumstances particular to each plaintiff and varying laws of particular jurisdictions would predominate.[18] In regard to the plaintiffs' negligence claim, however, Judge Grady held that no individual issues, originating either from peculiar circumstances or differences in state law, predominated over common negligence issues.[19]

Judge Grady held that, unlike individual proximate cause issues, the negligence issue could be resolved for the entire class in a single proceeding.[20] Rule 23(b)(3) requires, in addition to a predomination of common questions, that a class action be superior to other available methods for the fair and efficient adjudication of the controversy.[21] Class certification was held to be fair and economical for all parties involved, as compared to separate individual trials in various jurisdictions where "the same witnesses [would] monotonously repeat testimony they have given many times before."[22] In addition to saving valuable court time by resolving the negligence issue in a single proceeding, class certification of the negligence issue would save individual plaintiffs the cost of hiring expensive experts to provide their "monotonous and repetitive" testimonies, whereas defendants could simply draft a single set of questions to be used repeatedly at each trial.[23] However, because negligence laws are not uniform throughout the country, the problem of variances in negligence law had to be considered.

Judge Grady offered an innovative solution to the problem posed by the subtle variances in negligence laws of different states. Although negligence laws are not identical from state to state, the definition of "ordinary

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[17] *See* FED. R. CIV. P. 23(b)(3).

[18] *See Wadleigh*, 157 F.R.D. at 422.

[19] *See id.*

[20] *See id.*

[21] FED. R. CIV. P. 23(b)(3) is satisfied if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

[22] *Wadleigh*, 157 F.R.D. at 426.

[23] *See generally* Poole v. Alpha Therapeutic Co., 51 F.3d 638 (7th Cir. 1995). Like *Wadleigh*, this case involved a hemophiliac's suit against a manufacturer of blood concentrates. *Poole* is cited repeatedly in *Wadleigh* and forms a substantial basis for that opinion.

negligence" does not vary significantly from jurisdiction to jurisdiction.[24] In addition, the defendants and Judge Grady could locate no case law suggesting that the Restatement standard of negligence would not be appropriate in all jurisdictions.[25] However, the defendants contended that the products and procedures observed by each defendant were different; coupled with even subtle variances in negligence law, the defendants argued that a single jury trial would have been impracticable.[26] In response to this argument, Judge Grady devised a plan in which a "special verdict form" would be drafted.

Judge Grady proposed the drafting of a special verdict form with instructions to a jury pertaining to the ordinary or professional standard of care in equally general terms, applicable to all jurisdictions where the defendants' duties would be measured by such standard.[27] The special verdict form was inspired by *Poole v. Alpha Therapeutic Co.*,[28] a case that also involved a hemophiliac who became infected with the AIDS virus as a

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[24] *See Wadleigh*, 157 F.R.D. at 418–421. The defendants contended that negligence laws of various states were not uniform in regard to the duty imposed upon defendants in cases of that kind. Some jurisdictions would hold a fractionator only to the "professional standard of care," under which the plaintiff would have to prove that the conduct of the fractionator departed from what other fractionators were doing at that time. The professional standard, however, has been attacked as being "senselessly indulgent . . . [by making] the medical community answerable not for want of care but for want of conformity." *Id.* (citing Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1213. Under the ordinary negligence standard, the defendants would be held to a reasonable standard of care. The only difference in state negligence laws that the defendants could identify was between ordinary negligence and the legally questionable professional standard. In any event, Judge Grady concluded that just because defendants might be subject to different duties in different jurisdictions (professional or ordinary care), a multiplicity of individual issues is not created such that class certification could not be granted. *See id.*

[25] *See id.* at 420.

[26] *See id.* at 422.

[27] *See id.* at 424.

[28] 51 F.3d 638 (7th Cir. 1995).

result of a tainted blood transfusion.[29] The verdict form would have been drafted to allow a single jury to apply either the ordinary or professional standard of negligence, take into account variations in procedure by different defendants and record the dates on which violations, if any, began.[30] Judge Grady concluded that proper preparation of a special verdict form would result in the return of a single verdict that could be used for or against the defendants in jurisdictions throughout the country.[31] For example, if a particular defendant were found not guilty of ordinary negligence, that defendant would be absolved of any liability to any class members on a negligence theory.[32] However, if a defendant were found to have been negligent, that defendant would be subject to further prosecution by any class member who would then have the burden of proving that his HIV infection occurred as a result of using infected concentrate distributed by that particular defendant.[33] Defendants would either be completely exonerated or be subjected to a subsequent trial where they could still prove an absence of proximate cause between their product and the plaintiffs' infection.

In sum, Judge Grady sought to provide a fair and economical solution to one mass tort action. The special jury verdict form he suggested could have saved valuable court time by avoiding redundant testimonies regarding nearly identical negligence issues. In addition, individual plaintiffs could have been saved the sometimes exorbitant fees charged by many expert witnesses.[34] However, Judge Grady's plan was allowed neither the opportunity to succeed nor the opportunity to fail. For reasons that will now

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[29] The special verdict form in *Poole* resembles the following diagram:

Allegation	Defendant				
	D1	D2	D3	D4	D5
Use of paid plasma donors					
Failure to use surrogate testing					
Failure to adopt methods to inactivate viruses					
Failure to screen out previously rejected donors					

[30] *See* Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 425 (N.D. Ill. 1994).

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *See generally* Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429 (1986).

be analyzed, the Seventh Circuit Court of Appeals decertified the class on appeal.

III. INNOVATION OR USURPATION?

In *In re Rhone-Poulenc Rorer, Inc.*, the Seventh Circuit Court of Appeals commended Judge Grady's "innovative procedure for streamlining the adjudication of mass torts," but nonetheless ordered decertification of the class.[35] The *Rhone* court granted the extraordinary remedy of a writ of mandamus in light of three concerns the court had with Judge Grady's plan.[36] The *Rhone* court's logic in granting the writ and each of the court's three concerns will now be discussed in turn.

A. *Aggregation and Irreparable Harm Debate*

Two conditions must exist for a writ of mandamus to be granted.[37] First, the challenged order must not be effectively reviewable at the end of the case; the order must inflict irreparable harm.[38] Second, the order must exceed the proper bounds of judicial discretion so as to be legitimately considered usurpative in character or in violation of a clear and indisputable legal right.[39] Therefore, irreparable injury must be coupled with a gross, very clear or unusually serious abuse of discretion in order for mandamus to be issued.

The *Rhone* court held the irreparable harm requirement to have been met because an appeal by the defendants would come too late to provide effective relief for those defendants.[40] If the class were not certified, the defendants would have faced 300 lawsuits.[41] The court speculated that because the defendants had won twelve of thirteen individual suits already brought against them, the defendants would probably have faced liability in

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[35] *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S.Ct. 184 (1995).

[36] *See id.* at 1299.

[37] Because class certification is not a final decision within the meaning of 28 U.S.C. § 1291, class certification is not an appealable order. However, even nonappealable orders can be challenged by asking the court of appeals to mandamus the district court. Mandamus is issued only in extraordinary situations because otherwise, interlocutory orders could be termed "mandamus" rather than "appeal." *See id.* at 1294.

[38] *See* Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976).

[39] *See* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 289 (1988).

[40] *See Rhone*, 51 F.3d at 1297.

[41] *See id.* at 1298.

only twenty-five cases if the class was not certified.[42] Conjecturing further, the court hypothesized that class certification would involve 5,000 members and assumed that the negligence determination (applying Judge Grady's plan) would be decided in favor of the plaintiffs.[43] Somehow, the *Rhone* court then concluded that the defendants would face $25 billion in settlement costs if the class were certified. Because settlements are not appealable, the defendants would be left with no remedy, and the harm to them would be irreparable.[44] The *Rhone* court reached the irreparable harm conclusion based primarily on speculation regarding the number of class members, conjecture regarding the outcome of the initial litigation and the assumption that settlement would occur.

According to the *Rhone* court's logic, the irreparable harm requirement for granting mandamus will be satisfied by almost every class certification order. By their very nature, class certification orders increase the likelihood of settlement;[45] this does not make the certification order any less reviewable if defendants refuse settlement and decide to litigate to final judgment. The fact that class certification may influence settlement does not mean class certification inflicts irreparable harm. If the defendants litigate to final judgment and lose, the class certification order may then be appealed. The *Rhone* court makes certification orders reviewable on mandamus simply because the likelihood of settlement makes the order unreviewable at the end of the case.[46]

In her dissent to *Wadleigh*, Judge Rovner refuted the *Rhone* majority's assumption that Judge Grady's order would prompt settlements. The class portion of trial, she posited, would merely establish whether the defendants were negligent in distributing tainted blood factors.[47] Each defendant would then have ample opportunity, at subsequent individual trials, to show an absence of proximate cause on their part.[48] In addition, applying the majority's logic regarding the fact that twelve of thirteen previously tried suits held in favor of the defendants, the defendants would probably have been confident that a jury would hold in their favor. Therefore, no reason existed why the defendants should have been deterred from litigating the case to its conclusion. The *Rhone* majority was premature in surmising that a class verdict in favor of the plaintiffs would automatically result in

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[42] *See id.* The court further speculated that the potential damages from those hypothetical twenty-five cases would be $125 million.

[43] *See id.*

[44] *See id.*

[45] *See In re* Sugar Antitrust Litigation, 559 F.2d 481, 483-484 n.1 (9th Cir. 1977).

[46] *See Rhone*, 51 F.3d at 1306 (Rovner, J., dissenting).

[47] *See Wadleigh*, 157 F.R.D. at 423.

[48] *See Rhone*, 51 F.3d at 1307 (Rovner, J., dissenting).

billions of dollars in settlement damages and cause irreparable harm to the defendants.

B. *Original Procedure Held to Exceed Judicial Discretion*

The second condition required for the grant of a writ of mandamus is that the order against which mandamus is sought must so far exceed the bounds of judicial discretion as to be legitimately considered usurpative in character.[49] Although the *Rhone* court acknowledged that Judge Grady was "responding imaginatively and in the best of faith to the challenge that mass torts . . . pose for the federal courts," the second condition for granting mandamus was held to have been met.[50] The three concerns persuading the court to that conclusion will now be examined.

1. *Aggregation and Settlement Concerns*

First, the *Rhone* majority was concerned that even though defendants had won 92.3% of the previous trials (twelve of thirteen suits), class certification would force defendants to settle.[51] The court wished to avoid "forcing these defendants to stake their companies on the outcome of a single jury trial, or being forced . . . to settle . . . ."[52] Commentators have criticized the position adopted by opponents to aggregation and class certification in mass tort actions as primarily anticipatory.[53] Considering the fact that Judge Posner concedes defeat for the defendants in the original negligence suit and also projects seven-figure settlements for each plaintiff, his logic could undoubtedly be described as anticipatory. In addition, Judge Posner's reasoning was attacked in *In re Copley Pharmaceutical* for showing a profound mistrust in the jury system.[54] *Copley* is similar to *Rhone* in that the *Copley* defendant, a manufacturer of prescription pharmaceuticals, sought decertification of a class order in a products liability case. The *Copley* court found the logic in *Rhone* unpersuasive and

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[49] *See* Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980).

[50] *Rhone*, 51 F.3d at 1299.

[51] *See id.*

[52] *Id.*

[53] *See* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 568 (1987).

[54] 161 F.R.D. 456, 460 n.4 (D. Wyo. 1995). The *Copley* court also pointed out that since the defendants had been successful in twelve of thirteen previous trials, Judge Posner should have had faith that the class jury would also be able to make a fair determination. *See id.* at 460.

denied the decertification motion.[55] Rather than expressing a fear of settlement based on mere prognostications, Judge Posner should have expressed confidence that those defendants "forced to stake their companies on the outcome of a single jury trial" would be exonerated by a fair and impartial jury if they had committed no wrong.[56]

The Ninth Circuit's decision in *Arthur Young & Co. v. United States Dist. Court*[57] addressed the issue of settlement in securities class action cases. In *Arthur Young*, like *Rhone*, the defendants sought a writ of mandamus to vacate a class certification order excluding certain issues from the initial class trial.[58] The defendants argued that they would be faced with accepting millions of dollars in liability by settlement if the class was certified, an argument similar to the one Judge Posner found persuasive in *Rhone*.[59] However, the Ninth Circuit denied mandamus in *Arthur Young*, stating that interference with the trial court's discretion "on the basis of mere speculation by the parties or the ruling court about what may occur at some future date" is patently unwarranted.[60] In fact, the district judge was commended for taking a "novel and innovative" approach that could save time and money for litigants and the courts in complex litigations.[61]

The *Rhone* majority held that one jury cannot be trusted in a case of this magnitude, opting instead to submit the issues to multiple juries.[62] This holding will result in many of the problems that led to the use of class certification for mass tort actions in the first place. For example, the cost to each plaintiff will be extremely high as compared to defendants' costs. In a class action suit concerning antitrust law, Judge Posner's predecessors on the Seventh Circuit stated that permitting defendants to contest liability with each claimant in individual suits "would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent."[63] Mass tort claims are exceedingly, if not prohibitively, expensive for individual plaintiffs to litigate due to complex

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[55] *See id.*

[56] Denying class certification based upon fear that large businesses might be harmed by subsequent settlement proceedings was decried by the *Copley* court as "economic justice." The *Copley* court stated that "[s]uch economic reasoning may carry substantial weight in the Seventh Circuit, but this Court must look to FED. R. CIV. P. 23 . . . ." *Id.* at 460.

[57] 549 F.2d 686 (9th Cir. 1977).

[58] *See id.* at 687-688.

[59] *See id.* at 690.

[60] *Id.* at 692.

[61] *Id.* at 698.

[62] *See Rhone*, 51 F.3d at 1300.

[63] Weeks v. Bareco Oil Co., 125 F.2d 84, 90 (7th Cir. 1941).

issues and the requirement of costly expert testimonies.[64] Defendant firms are able to spread litigation costs over the entire class of claims whereas individual plaintiffs cannot.[65] In addition, the interests of justice are not furthered by needless, time-consuming repetition of evidence and repeated litigation of common issues.[66] Relitigating the same negligence issue in different actions before different courts unnecessarily consumes valuable court time.[67] Judge Posner's settlement logic ignores the benefits that class certification would have served: leveling of plaintiffs' and defendants' relative costs, avoidance of redundant relitigation of the negligence issue and judicial economy.

2. *Amalgamation of Negligence Laws Concern*

The second concern expressed by Judge Posner in *Rhone* was the manageability of the negligence laws of various jurisdictions. The *Rhone* court pointed out that negligence laws may vary between states: "The voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch."[68] In spite of these variances in intonation, Judge Posner himself conceded that, at some level of generality, the law of negligence is identical, not only nationwide but worldwide.[69] Although negligence laws between the states are not identical, subtle variances in state law are not necessarily grounds for mandamus. For example, in *In re Diamond Shamrock Chemicals Co.*, the Second Circuit refused to grant mandamus and decertify a class action against the chemical companies responsible for deformities caused by Agent Orange.[70] The *Diamond Shamrock* court, like Judge Posner, was skeptical of attempting to create a "national substantive rule" that might offend the *Erie* doctrine.[71]

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[64] *See* Rosenberg, *supra* note 53, at 563.

[65] *See id.* at 564.

[66] *See* NEWBERG ET AL., *supra* note 2, § 17.01.

[67] *See* WRIGHT & MILLER, *supra* note 3, § 1783.

[68] *Rhone*, 51 F.3d at 1301.

[69] *See id.* at 1300.

[70] 725 F.2d 858 (2d Cir. 1984). This case involved review of the decision *In re "Agent Orange" Products Liability Litigation*, 635 F.2d 987 (2d Cir. 1980), *mandamus denied sub nom. In re Diamond Shamrock Chemicals Co.*, 725 F.2d 858 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984). In *Agent Orange*, Judge Weinstein intended to create subclasses dictated by variations in state products liability laws. This plan is similar to Judge Grady's use of a special verdict form to take into account variations in state negligence laws.

[71] *See Diamond Shamrock*, 725 F.2d at 861–862 (citing Erie R.R. v. Tomkins, 304 U.S. 64 (1938)). Extremely briefly, *Erie* stands for the proposition that "federal common law" is not binding precedent on state courts.

However, Judge Winter recognized that class action cases present unique challenges to the judicial system. Thus, a unique approach, such as a single dispositive trial on common issues, was held not to be an error properly remediable by mandamus.[72] Judge Winter realized that review of the issues raised by the class certification would be available when the ramifications of the ruling were known for sure.[73] Unlike Judge Posner, Judge Winter refused to allow speculation about future trials (or settlements) to influence his holding.

Similar to the Second Circuit in *Diamond Shamrock*, the Third Circuit allowed an innovative approach to the diversity of law problem in mass tort litigation. In *In re School Asbestos Litigation*, a class of school districts sought damages from asbestos manufacturers.[74] Like *Rhone*, the potential liability to the defendants in *School Asbestos* was immense, estimated to be billions of dollars.[75] In order to overcome differences in products liability laws in various jurisdictions, the types of laws were divided into categories similar to the negligence law categories Judge Grady would have included in his special verdict form.[76] The *School Asbestos* court admitted to harboring doubts regarding the viability of the plan but refused to "foreclose an approach that might offer some possibility of improvement over the methods employed to date."[77] In contrast to Judge Posner's staunch refusal to even allow Judge Grady's innovative solution to a complex problem a chance for success, the *School Asbestos* court commended the district judge for demonstrating a willingness to attempt to cope with an unusual situation. Judge Grady's plan might have been an "improvement over methods employed to date," but it never even had the opportunity.

Judge Grady in *Wadleigh*, Judge Weinstein in *Agent Orange* and Judge Kelly in *School Asbestos* each developed innovative solutions to avoid the waste of judicial and private resources caused by relitigation of common issues in mass tort class action litigations. In spite of reservations held by each circuit regarding the procedural innovations, the Ninth and Third

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[72] *See Diamond Shamrock*, 725 F.2d at 861–862. In spite of some misgivings, Judge Winter refused to decertify the class "at least before the full results . . . are known." *Id.* at 862. Unlike Judge Posner, Judge Winter at least gave Judge Weinstein's plan a chance to succeed.

[73] *See id.* at 862.

[74] 789 F.2d 996 (3d Cir. 1986).

[75] *See id.* at 1000.

[76] *See id.* at 1010.

[77] *Id.* at 1011. The *School Asbestos* court stated that "we are not inclined to reverse a certification before the district judge has had an opportunity to put the matter to a test. We point out the critical fact that certification is conditional. When, and if, the district court is convinced that the litigation cannot be managed, decertification is proper." *Id.*

Circuit Courts of Appeals both refused to deny the unique solutions the opportunity to succeed. Judge Posner and the Seventh Circuit did not give Judge Grady's plan a similar opportunity.

3. *Seventh Amendment Concern*

The *Rhone* court's third concern related to the district court's selection of only the negligence issue for class certification. Judge Posner concluded that the issues of proximate cause and comparative negligence were inseparable from the defendant's negligence. Thus, the multiple juries that Judge Grady envisioned as only deciding the proximate cause issue would actually be reconsidering the defendants' negligence in violation of the Seventh Amendment's double jeopardy provision.[78] Since proximate causation is found by determining whether the harm to the plaintiff followed in some sense naturally, without interruption and with reasonable probability from the negligent act of the defendant, the negligence issue was held to overlap the proximate cause issue.[79] This conclusion has been attacked by courts and commentators as contrary to Rule 23(c)(4)(A) and as an inappropriate reason for the granting of mandamus.

The Seventh Circuit's conclusion that division of the negligence and proximate cause issues would violate the Seventh Amendment runs contrary to the language of Rule 23(c)(4)(A).[80] In fact, the Official Comment to Rule 23(c)(4)(A) suggests a division of issues similar to that proposed by Judge Grady:

> [T]his provision recognizes that an action may be maintained as a class action as to particular issues only . . . the action may retain its 'class' character only through adjudication of liability to the class; members of the class may thereafter be required to come individually and prove the amounts of their respective claims.[81]

The *Copley* court decried Judge Posner's holding as having the effect of taking away one of the most valuable means available to courts for effective management of mass tort litigation.[82] Commentators have pointed out that

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[78] *See Rhone*, 51 F.3d at 1303 (citing Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494 (1931)).

[79] *See id.*

[80] FED. R. CIV. P. 23(c)(4)(A) states, "an action may be brought or maintained as a class action with respect to particular issues." *Id.*

[81] *In re* Copley Pharmaceutical, Inc., 158 F.R.D. 485, 491 n.1 (D. Wyo. 1994) (citing Official Comment to FED. R. CIV. P. 23(c)(4)(A)).

[82] *See Copley*, 161 F.R.D. at 461.

innovative solutions to the problems caused by mass tort litigation should be given deference with respect to constitutionality because such solutions have the potential to achieve levels of justice that would be impossible in traditional individual trials.[83] Rule 23(c)(4)(A) clearly provides for separation of issues in class action litigation. Thus, any constitutional question would have to concern the soundness of that Rule not the application of the Rule by Judge Grady in *Wadleigh*.

In her dissent to the *Rhone* decision, Judge Rovner maintained that the majority's constitutional concern would be better focused upon Rule 23 itself than with a proposed use of that Rule. Judge Rovner argued that Judge Posner made a compelling case for amending Rule 23, not for avoiding Judge Grady's original application of it.[84] Moreover, if the original class jury found the defendants were not negligent, no constitutional question ever would have arisen. Once again, mere speculation caused Judge Posner to eliminate a viable technique for resolution of mass tort disputes.

The proper time for review of a constitutional question regarding Judge Grady's plan would have been *after* an issue of constitutionality actually arose. As Judge Rovner pointed out, the reviewing court would then have a record to examine instead of having to conjecture about possible future constitutional violations.[85] In *Jenkins v. Raymark Industries*, the Fifth Circuit approved an innovative solution offered by a district judge for resolution of a class action suit involving plaintiffs with asbestos-related injuries.[86] The *Jenkins* court acknowledged that constitutional concerns are legitimate when dividing issues for class consideration but refused to decertify the class before a constitutional violation came into existence.[87] Judge Reavley, considering the need for innovative approaches to reduce the alarming backlog of court dockets caused by individual litigation of issues that could be class certified, stated that "[n]ecessity moves us to change and invent . . . .[S]pecific issues could be decided in a class 'mass tort' action—even on a nationwide basis."[88] The Fifth Circuit would surely agree with

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[83] *See* Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 851 (1992).

[84] *See Rhone*, 51 F.3d at 1307-1308 (Rovner, J., dissenting).

[85] *See id.* at 1307 (Rovner, J., dissenting).

[86] 782 F.2d 468 (5th Cir.), *reh'g denied*, 785 F.2d 1034 (5th Cir. 1986).

[87] *See id.* at 474.

[88] *Id.* at 473. Commentators have lauded the procedure applied by the court in *Jenkins*. A Note by the Institute of Civil Justice states:

> [T]he class action rapidly increased the pace of litigation. Basic discovery for all cases was completed in one month . . . [w]ithin seven months of certification of the class, the class action disposed of almost all . . . claims pending at the time of certification. This

Judge Rovner that the mere possibility of a constitutional violation should not result in automatic class decertification.[89]

IV. CONCLUSION

Judge Posner ordered a writ of mandamus and decertified the class in *Rhone* because he believed that Judge Grady's plan exceeded the bounds of judicial discretion so far that it could be considered usurpative.[90] Three primary concerns led to this conclusion: settlement, amalgamation of negligence law and Seventh Amendment concerns.[91] The defendants in *Arthur Young* faced the possibility of millions of dollars in settlement liability, but the Ninth Circuit refused to interfere with a "novel and innovative" plan on the basis of mere speculation.[92] The Second and Third Circuits faced the problem of amalgamation of laws in *Diamond Shamrock* and *School Asbestos*, respectively. In *Diamond Shamrock*, Judge Winter denied mandamus because the ramifications of the certification order should be fully ascertained before mandamus is proper.[93] Judge Kelly, in *School Asbestos*, refused to deny an original plan the opportunity to improve on methods currently employed to resolve mass tort disputes.[94] The Fifth Circuit addressed the possibility that amalgamation could result in a constitutional violation in *Jenkins*. Judge Reavley acknowledged that constitutional concerns are legitimate when combining issues for class certification, but mandamus is improper until such a violation actually occurs.[95] The Second, Third, Fifth and Seventh Circuits all faced similar issues regarding the legality of the trial judges' plans. None of the Courts of Appeals were completely convinced that the procedures adopted by the trial judges would succeed, but only Judge Posner in the Seventh Circuit let his misgivings take precedence over actualities.

Mass tort litigation poses daunting problems to the United States

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contrasts sharply with the pace of litigation before certification of the class; some claims within the class had been pending for up to seven years.

PETERSON & SELVIN, *supra* note 1, at 46.

[89] *See Rhone*, 51 F.3d at 1307 n.3 (Rovner, J., dissenting). Judge Rovner's opinion was that "the law requires that Judge Grady's plan be given the opportunity to succeed. Class certification orders are, after all, conditional orders subject to modification or revocation as the circumstances warrant." *Id.* at 1308.

[90] *See Rhone*, 51 F.3d at 1297.

[91] *See id.* at 1295.

[92] *See* discussion *supra* Part III.B.1.

[93] *See* discussion *supra* Part III.B.2.

[94] *See id.*

[95] *See* discussion *supra* Part III.B.3.

judicial system. Class certification on particular issues is allowed by Rule 23(c)(4)(A) and has been proven an effective means of reducing the backlog of our overburdened courts.[96] Like many judges before and since, Judge Grady was offering an innovative solution to the complex problem of mass tort litigation. Unlike those other judges' plans, Judge Grady's plan was not afforded a chance to help improve the resolution of mass tort disputes. As one source noted regarding the use of original procedures in mass tort cases, "necessity is the mother of invention. And sometimes inventions work better than the devices they have been modeled after."[97] Judge Grady invented a device modeled in accord with precedent and the clear language of Rule 23(c)(4)(A), but whether or not his invention worked better than the devices it was modeled after will never be known.

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[96] *See Copley*, 161 F.R.D. at 458 (stating "[s]ubsequent to class certification, this action has moved forward with surprising speed and efficiency."). *See also* PETERSON & SELVIN, *supra* note 1.

[97] Saks & Blanck, *supra* note 83.